THE TORT OF CONSPIRACY.

Whether conspiracy is a substantive cause of tort action remains a fruitful source of controversy, and the literature of the subject has received some notable additions during recent months. Under the title of *James* v. *Evans*[1] the Circuit Court of Appeals for the Third Circuit has reversed *Evans* v. *Freeman & James*,[2] holding that "in an action on the case for conspiracy the gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff"; and that as the tort in this case was capable of commission either by both defendants jointly, or by either separately, the decision of the Circuit Court was erroneous. The opinion is written by District Judge Bradford, and, it is submitted, is distinctly inferior, both in its consideration of authorities, and in its discussion of principles to that of District Judge Hammond, who delivered the opinion at Circuit.[3] It is to be hoped that a decision upon this subject may soon be rendered by the United States Supreme Court.

Judge Bradford cites *Collins* v. *Cronin*[4] as one of his authorities for the doctrine stated above. But that case is clearly opposed to his doctrine, for Justice Paxson there said: "In the case in hand the conspiracy was everything. Without it the plaintiff had no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone."

The learned judge might have discovered, in more recent Pennsylvania reports, other cases which are opposed to what he terms "the ancient and well-established doctrine applicable to civil actions charging conspiracy." In *Purvis* v. *United Brotherhood*,[5] defendants demanded that plaintiff should employ only union workmen; and declared that they intended to drive plaintiff out of business unless he unionized his mill. They also notified customers of plaintiff not to deal with him, threatening strikes on such third persons' establishments if they continued to deal with him. The

[1] (1906) 149 Fed. 136. [2] (1906) 140 Fed. 419.

[3] See 7 COLUMBIA LAW REVIEW 236.

[4] (1887) 117 Pa. 35; 11 At. 869.

[5] (1906) 214 Pa. 348; 63 At. 585, following Erdman *v.* Mitchell (1903), 207 Pa. 79; 59 At. 327. See George Jonas Glass Co. *v.* Glass Bottle, etc. Assoc. (1907, N. J. Eq.) 66 At. 953.

combination of the defendants to accomplish such a purpose was held to be an unlawful conspiracy, although under existing legislation in Pennsylvania it is not a crime.

The distinction between cases in which conspiracy is the gist of the action and in which it is not is brought out very clearly in a recent volume of Massachusetts reports. In *Bilafsky* v. *Conveyancers' Title Ins. Co.*,[6] the Court said: "This is one of those cases where the allegations as to conspiracy are at most allegations that what is alleged to have been done was done jointly. In such cases the acts alleged to have been done by the conspirators are not actionable unless they would have been actionable had they been done by the defendants severally." In *Pickett* v. *Walsh*,[7] the conspiracy of the defendants was held to be the very essence of their wrongdoing. Said the Court:

"A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight one individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have. The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. * * * For the general proposition, that what is lawful for an individual is not necessarily lawful for a combination of individuals see *Quinn* v. *Leathem*,[8] *Mogul Steamship Co.* v. *McGregor*,[9] *Gregory* v. *Brunswick*.[10] It is in effect concluded by *Plant* v. *Woods*."[11]

The view taken by Judge Hammond in *James* v. *Evans*[12] was approved and applied in *Allis-Chalmers Co.* v. *Iron Molders' Union No. 125*[13] by the Circuit Court for the Eastern District of Wisconsin. In this case the Court held that "the constant maintenance of pickets by strikers after repeated acts of violence, the use of abusive epithets, and the creation of an unfriendly atmosphere surrounding workmen by such pickets constitutes a conspiracy for

[6] (1906) 192 Mass. 504, 78 N. E. 534.
[7] (1906) 192 Mass. 572; 78 N. E. 753; 6 L. R. A. N. S. 1067.
[8] (1901) A. C. 495, 511.
[9] (1892) A. C. 25, 45, affirming 23 Q. B. D. 598, 616.
[10] (1843) 6 M. & G. 205; s. c. on appeal 3 C. B. 481.
[11] (1900) 176 Mass. 492, 57 N. E. 1011. [12] (1906) 149 Fed. 136.
[13] (1906) 150 Fed. 155.

the purpose of willfully or maliciously injuring the business of an employer." It also declares a conspiracy to wrongfully injure another to be actionable at common law, if it be so carried out as to cause damage, irrespective of whether the person injured would have had a remedy if the act had been done by a single person. The important case of *Randall* v. *Lonstorf*[14] is cited as settling the rule for Wisconsin that an act lawful when done by one person may be actionable when done by two or more in combination, which was binding upon the federal court.[15]

In the latest edition of his treatise on Torts[16] Mr. Bigelow seems to accept the view that conspiracy is at times a substantive tort, although in former editions he has rejected it. He writes:

"Passing by the criminal side of the subject as not within the scope of the present inquiry, one cannot fail to notice that we are in the way of a new tort if we have not indeed already reached the point; a tort founded, contrary to former ideas, upon conspiracy as motive as well as intent. Recent cases indicate that the Courts will not allow the formula of legal right to stand in the way of an action for damages by conspiracy. That is to say, the Courts are becoming accustomed to the idea that it should not follow that, because in certain cases one person may of legal right do an act to the damage intentionally of another, several persons may combine, with a malicious purpose to inflict damage."[17]

The action of *Sweeney* v. *Coote*[18] was brought for an injunction to restrain the defendant from unlawfully and maliciously conspiring with other persons to injure the plaintiff in her business and for damages. The plaintiff, a Roman Catholic, was appointed to give manual instruction in a national school under Presbyterian management. The defendant called a meeting of parents of children attending the school, at which several present came to an arrangement to withdraw their children from the school because of plaintiff's employment. This injured plaintiff by reducing her salary, which depended upon a capitation grant. The trial judge, being of the opinion that the defendant had unlawfully conspired with others to harm the plaintiff, granted the injunction and

[14] (1905) 126 Wis. 147. See 7 COLUMBIA LAW REVIEW 239.

[15] White *v.* White (1907) 111 N. W. 1116, is another Wisconsin case of conspiracy.

[16] Bigelow on Torts (1907) 8th Ed., p. 24.

[17] The author cites in this connection Plant *v.* Woods (1900) 176 Mass. 492; Berry *v.* Donovan (1905) 188 Mass. 353; Quinn *v.* Leathem (1901) A. C. 495. In another similar connection he cites Klingel's Pharmacy *v.* Sharp & Dohme (1906) 104 Md. 218, 64 At. 1029.

[18] (1906) 1 Ir. R. 51; s. c. on appeal (1907) A. C. 221.

directed damages to be assessed. On appeal the Chancery Division (Walker, L. J., dissenting) held that the defendant did combine with other parents to withdraw their children, and that such withdrawal resulted in loss to the plaintiff; but that the combination was not unlawful, and that no unlawful means were used to attain it; and, therefore, the plaintiff had no cause of action. This decision was affirmed by the House of Lords.

Of this case the *Law Quarterly Review*[19] says: "It is a notable addition to the weight of authority and learned opinion against the doctrine, strenuously maintained in this country by Lord Halsbury, that conspiracy is a substantive cause of action." After a careful study of all of the opinions reported in this case the writer feels constrained to question the accuracy of the statement just quoted. Lord Chancellor Loreburn says: "It is an action for conspiracy and no other ground is relied upon." Lord Halsbury declares: "There is no evidence upon which I think any court ought to rely * * * for saying that in this case there is any proof of a combination in the sense in which it is necessary for there to be in order to form the ground for an action for conspiracy." Lord Robertson remarked: "I do not think that this House is required to discuss once more the delicate questions of the law of conspiracy, merely because this case is labelled as belonging to that chapter of the law, when there are no facts to justify the description." Not one of the seven Lords taking part in the decision intimates a doubt that conspiracy may be a substantive cause of action. Nor is such a doctrine denied by any of the Irish judges in the lower courts.

In the opinion of the *Law Quarterly Review*, "The short reason of policy against that doctrine is that it would allow a single powerful capitalist, who might of course be a corporation as well as a natural person, to do with impunity things which would be no less oppressive for being done under a single control. The net of the law would catch the dog-fish by twos and threes and let the great shark escape." That the doctrine would operate in this way is not admitted; but, if it must so operate, the argument of the writer just quoted should lead to the immediate repeal of all statutes punishing conspiracy as a crime.

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[19] Vol. 23, at p. 364.